FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 791

LLOYD C. DUNCAN,

Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

J. GARNER ANTHONY,
Castle & Cooke Building, Honolulu 1, Hawaii,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Castle & Cooke Building, Honolulu 1, Hawaii.

Subject Index

	Page
Opinions Below	2
Summary Statement of Matter Involved	2
Jurisdiction	6
Questions Presented	7
Reasons Relied on for Allowance of Writ	7

Table of Authorities Cited

Cases	Pages
Hirabayashi v. United States, 320 U. S. 81 (1943)	8
Milligan, Ex parte, 4 Wall. 2 (1866)	8
Quirin, Ex parte, 317 U. S. 1 (1942)	8
Sterling v. Constantine, 287 U. S. 378 (1932)	8

Statutes

Hawaiian Organic Act, Sec. 5, 31 Stat. (1900) 141, 48 U. S. C. 495	9
Hawaiian Organic Act, Sec. 67, 31 Stat. (1900) 153, 48 U. S. C. 532	3, 9
Criminal Code, Sec. 272, 54 Stat. 304, 18 U. S. C. 451	2
Criminal Code, Sec. 276, R. S. 5346, 18 U. S. C. 455	2
Judicial Code, Sec. 240(a), 28 U. S. C. 347	6
Assault: Revised Laws of Hawaii 1935, Ch. 166	2

Appendix

The Federal Constitution:	
Article I, Sec. 9, Cl. 2	i
Amendments:	
Article V	i
Article VI	i
Hawaiian Organic Act	ii
Criminal Code	iii
Revised Laws of Hawaii 1935 as amended	iv

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No.

LLOYD C. DUNCAN,
Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Lloyd C. Duncan, petitioner, respectfully prays for a writ of certiorari to the United States Circuit Court

NOTE: For the pertinent provisions of the Constitution, the Hawaiian Organic Act and statutes, see Appendix (infra pp. i-iv).

of Appeals for the Ninth Circuit to review the final decree of said court entered November 1, 1944, reversing the judgment of the District Court of the United States for the Territory of Hawaii.

OPINIONS BELOW.

The decision of the District Court (R. 389) is not reported. The opinions of the Circuit Court of Appeals (R. 1188) are not reported to date.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the validity of the trial of a civilian residing in Hawaii who was charged, tried, convicted and imprisoned for a term of six months by a military tribunal for the alleged offense of assault and battery on a sentry stationed at a naval reservation, an offense made criminal under existing law[1] applicable in Hawaii.

The alleged offense for which petitioner was tried and convicted, was assault and battery upon naval personnel contrary to General Order 2:8.01 (R. 110). The offense, constituting as it did, an offense against both federal and territorial law and not involving any act hostile to the government or any act contrary to

[1] A conviction of assault and battery under federal law carries punishment ranging from twenty years in grave cases to three months for simple assault (R. S. 5346; 18 U. S. C. 455); conviction under territorial law carries punishment ranging from twenty years to six months' imprisonment (Revised Laws of Hawaii 1935, Ch. 166); the District Court has concurrent jurisdiction with the territorial courts in such cases (54 Stat. 304; 18 U. S. C. 451).

the law of war or any act contrary to the Articles of War was clearly within that class of offenses constitutionally triable only by a jury.

Petitioner's trial before a provost court at Pearl Harbor took place on March 2, 1944 at a time when the courts of the territory were in full exercise of their statutory powers, trying criminal and civil cases of every nature.

The District Court released the prisoner on a writ of habeas corpus holding the military trial invalid. The Circuit Court of Appeals reversed the judgment of the District Court and ordered the petitioner remanded to custody.

On December 7, 1941, after the Japanese attack on Pearl Harbor, J. B. Poindexter, Governor of Hawaii, by proclamation invoked Section 67 of the Hawaiian Organic Act (31 Stat. 153; 48 U. S. C. 532) suspended the privilege of the writ of habeas corpus and proclaimed martial law throughout the territory (R. 12). This action was approved by the President (R. 61). The Governor, however, in his proclamation went beyond the provisions of Section 67 of the Hawaiian Organic Act by purporting to delegate to the Commanding General the judicial power to try and punish civilians for violation of federal and territorial law. The text of the Governor's proclamation was neither submitted to the President nor approved by him, the President did approve the Governor's action suspending the writ of habeas corpus and placing the territory under martial law in accordance with Section 67 of the Hawaiian Organic Act.

On the same day General Short proclaimed to the people of Hawaii:

> "I have this day assumed the position of military Governor of Hawaii and have taken charge of the government of the Territory, of the preservation of order therein and of putting these islands in a proper state of defense (R. 59) * * *"

The self-styled "military governor" issued General Order No. 4 (R. 1194) erecting military commissions and provost courts for the trial of civilians:

> "For offenses against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities".[2]

On December 8, 1941, the civil courts of Hawaii were suppressed by order of General Short and army personnel moved in and took over the courtrooms, clerks' offices, clerks and facilities of the District Court of Honolulu (a court of limited jurisdiction) and other inferior courts throughout the territory for the trial of cases brought before the provost courts (R. 594-9).

On December 16, 1941, General Order No. 29[3] (R. 1194) relaxed the original order closing the civil courts and permitted them to operate to a limited extent in uncontested civil matters. Trial by jury in either civil or criminal cases or the subpoenaing of

[2] G.O.'s 1 to 181 covering the period December 7, 1941 to January 30, 1943 including G.O. 4, 29 and 57 referred to in the opinion of the court are Exhibit V in evidence which has not been printed; these orders were revoked on February 8, 1943 and new orders issued (R. 94 to 362).

[3] See ante n. 2.

witnesses was forbidden. A further modification was made by General Order 57 (R. 1194)[4] on January 27 which authorized the civil courts to entertain civil cases "as agents of the military governor". However the prohibition against trial by jury and the summoning of grand juries and the issuance of a writ of habeas corpus remained.

The trial of criminal cases of every description before military tribunals continued unabated from December, 1941 until after the appointment of District Judge Ingram M. Stainback, as governor of Hawaii on July 23, 1942. The new governor convinced that no necessity warranted the trial of civilians before military tribunals and also convinced that the creation of a military government over Hawaii without the authority of Congress was not only illegal but entirely unnecessary, proceeded to Washington to accomplish the restoration of civil government. There his negotiations with the War Department, Justice Department and the Department of the Interior (R. 880-4) resulted in a compromise and the issuance of his proclamation of February 8, 1943, which restored civil government (R. 14). General Emmons at the same time issued a similar proclamation as "military governor" of Hawaii (R. 77).

No public disorder has existed at any time in Hawaii since the outbreak of war, admittedly on the contrary, the conduct of the civil population has been exemplary (R. 583, 596, 664, 687, 746, 770, 821, 1140, 1143).

---

[4]See ante n. 2.

Petitioner's trial took place on March 2, 1944, a year after the proclamation restoring civil government. The courts of the territory (federal and territorial) had been functioning for more than a year trying civil and criminal cases of every character. No military necessity existed for the military trial of a civilian for the alleged offense of assault and battery on military personnel and the finding of this fact by the District Court was supported by the overwhelming weight of the evidence. The act for which petitioner was charged was a violation both of territorial and federal law. He could have been charged and tried in the same manner as numerous other defendants had been charged and tried in Hawaii during the year before his military trial. The decree of the Circuit Court of Appeals in reversing the District Court for the Territory of Hawaii has decided an important question of constitutional and federal law contrary to the Federal Constitution, the Fifth and Sixth Amendments and Section 67 of the Hawaiian Organic Act.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 1, 1944. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. 347).

QUESTIONS PRESENTED.

The questions presented may be summarized:

(1) Did the provost court have jurisdiction to try, sentence and imprison petitioner, a civilian residing in Hawaii for an alleged offense which is not an offense against the law of war or the Articles of War, the alleged offense not involving any acts hostile to the government but constituting a crime under applicable federal and territorial law and the civil courts having jurisdiction over the subject matter being fully able to discharge their statutory powers?

(2) Was the privilege of the writ of habeas corpus suspended as to this case on April 20, 1944?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

This cause involves fundamental issues of civil liberties which go to the very root of our form of government. The Circuit Court of Appeals has reversed the judgment of the District Court and held that in time of war upon a proclamation of martial law, it was lawful to erect a military government over loyal American territory—a government in which the will of the commanding general and not the Constitution and laws of the United States was the supreme law of the land. The decision is without precedent in our history.

The court below has held that the authority entrusted by the Congress to the governor of Hawaii to suspend the privilege of the writ of habeas corpus and to proclaim martial law permitted the commanding

general to erect a "total military government" in Hawaii.

The decision below is contrary to controlling decisions of this Court.

Ex parte Milligan, 4 Wall. 2 (1866);
Sterling v. Constantine, 287 U.S. 378 (1932);
Ex parte Quirin, 317 U.S. 1, (1942).

The decision below deprives the petitioner of the right of trial by jury and indictment by grand jury contrary to the provisions of the Fifth and Sixth Amendments to the Federal Constitution. If permitted to stand this decision will remain a precedent authorizing the complete suppression of civil government in time of war after a declaration of martial law and the substitution of military trials for jury trials in that class of offenses which are traditionally and constitutionally triable only by jury.

The court below misinterpreted the opinion of this Court in the case of *Hirabayashi v. United States*, 320 U.S. 81 (1943). There this Court held that a military order authorized by Act of Congress was enforceable in the federal courts. The court below considered the *Hirabayashi* case authority for holding that a military order could be enforced in a military court without statutory authority.

A military tribunal is without jurisdiction to try a civilian for an offense against the general law applicable in the territory which is neither an offense against the Articles of War or the law of war or which does not involve an act hostile to the United States, so long as the courts, federal and territorial,

are discharging their statutory powers and no obstacle exists to a lawful prosecution in said courts. The offense for which petitioner was tried was within the class of offenses constitutionally triable only by jury, therefore his trial in the provost court being contrary to the Fifth and Sixth Amendments was void.

The Federal Constitution and particularly the first ten amendments are applicable to Hawaii having been expressly extended to the territory by Act of Congress (31 Stat. (1900) 141, 48 U.S.C. 495). Section 67 of the Hawaiian Organic Act does not have the effect of depriving the inhabitants of the territory of their constitutional rights, particularly the right of trial by jury nor does it permit the jurisdiction of military tribunals to be exercised over civilians in causes which military tribunals could have no jurisdiction in like circumstances within the states of the United States.

The military orders purporting to authorize petitioner's trial were not authorized or approved by either the governor or the President. No act of the Congress authorized the military trial of petitioner. No act of the Congress authorized the creation of a military government in Hawaii. The decision of the court below holding that the congressional authority given the governor to proclaim martial law authorized "total military government" is a distortion of the words of the Hawaiian Organic Act. Congress did not authorize the governor to surrender his statutory duties as chief executive to the commanding general nor did it authorize the governor to delegate judicial powers to the commanding general.

The court below has confused the power to arrest and detain persons suspected of being hostile to the government with the power to try and punish loyal citizens for violations of ordinary municipal law.

Neither Article I, Section 9 of the Federal Constitution nor Section 67 of the Hawaiian Organic Act contemplate any general suspension of the privilege of the writ of habeas corpus in all cases. The purpose of Article I, Section 9 of the Federal Constitution and the purpose of Section 67 of the Hawaiian Organic Act was to permit the detention of persons who might be hostile to the government. These provisions were never intended to prevent a judicial review or the release of a citizen tried before a military tribunal for an offense of the class constitutionally triable only by jury.

This cause involves the fundamental question whether in time of war after a declaration of martial law with the courts open and in the complete exercise of their statutory powers the right of trial by jury is to be scrapped and military trials substituted in that class of cases which traditionally and constitutionally are triable only by jury. The decision below in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land. It is not only without precedent in our judicial history but embodies a principle contrary to the very genius of our form of government. A review and determination of this case by this Court will settle constitutional issues of first importance.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify to and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 10763, Duke Paoa Kahanamoku, etc., Appellant v. Lloyd C. Duncan, Appellee" and that the decree of said court be reversed by this Court and that the judgment of the United States District Court for the Territory of Hawaii be affirmed.

Dated, Honolulu, Hawaii,
December 27, 1944.

LLOYD C. DUNCAN,
Petitioner.

By J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix

Constitution of the United States

Art. I, Sec. 9, Cl. 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Amendments

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the assistance of counsel for his defense."

Hawaiian Organic Act

"Sec. 5. The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States * * *" (31 Stat. (1900) 141, 48 U.S.C. 495).

"Sec. 66. The executive power of the government of the Territory of Hawaii shall be vested in a governor who shall be appointed by the President by and with the advice and consent of the Senate of the United States, * * *" (31 Stat. (1900) 153, 48 U.S.C. 531).

"Sec. 67. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known" (31 Stat. (1900) 153, 48 U.S.C. 532).

Sec. 276:

"Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever shall assault another with intent to commit any felony, except murder, or rape shall be fined not more than $3,000, or imprisoned not more than ten years, or both. Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both. Whoever shall unlawfully strike, beat, or wound another, shall be fined not more than $500, or imprisoned not more than six months, or both. Whoever shall unlawfully assault another, shall be fined not more than $300, or imprisoned not more than three months, or both" (R.S. sec. 5346, Mar. 4, 1909, c.321, sec. 276, 35 Stat. 1143).

Sec. 272, Amended:

"Third. When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building" (June 11, 1940, c. 323, 54 Stat. 304, 18 U.S.C. 451).

Ch. 166, as amended:

"*Sec. 5653. Assault with intent to murder, maim or disfigure.* Whoever shall assault another, with intent to murder, or to maim or disfigure his person in any of the ways mentioned in the preceding section, shall be judged guilty of assault in the first degree, and shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor not more than five years."

"*Sec. 5654. Assault with dangerous weapon with intent to commit certain felonies.* Whoever, being armed with a dangerous weapon, shall assault another, with intent to commit any offense punishable by death, imprisonment for life, or imprisonment for twenty or more years, for the punishment of which assault no special provision is otherwise expressly made, shall be punished by imprisonment at hard labor not more than twenty years" (S.L.H. 1935, p. 174).

"*Sec. 5659. Assault; punishment.* Whoever shall commit an assault upon another, for which no other penalty is prescribed by law, shall be punished by a fine of not more than one hundred dollars or by imprisonment not more than six months."